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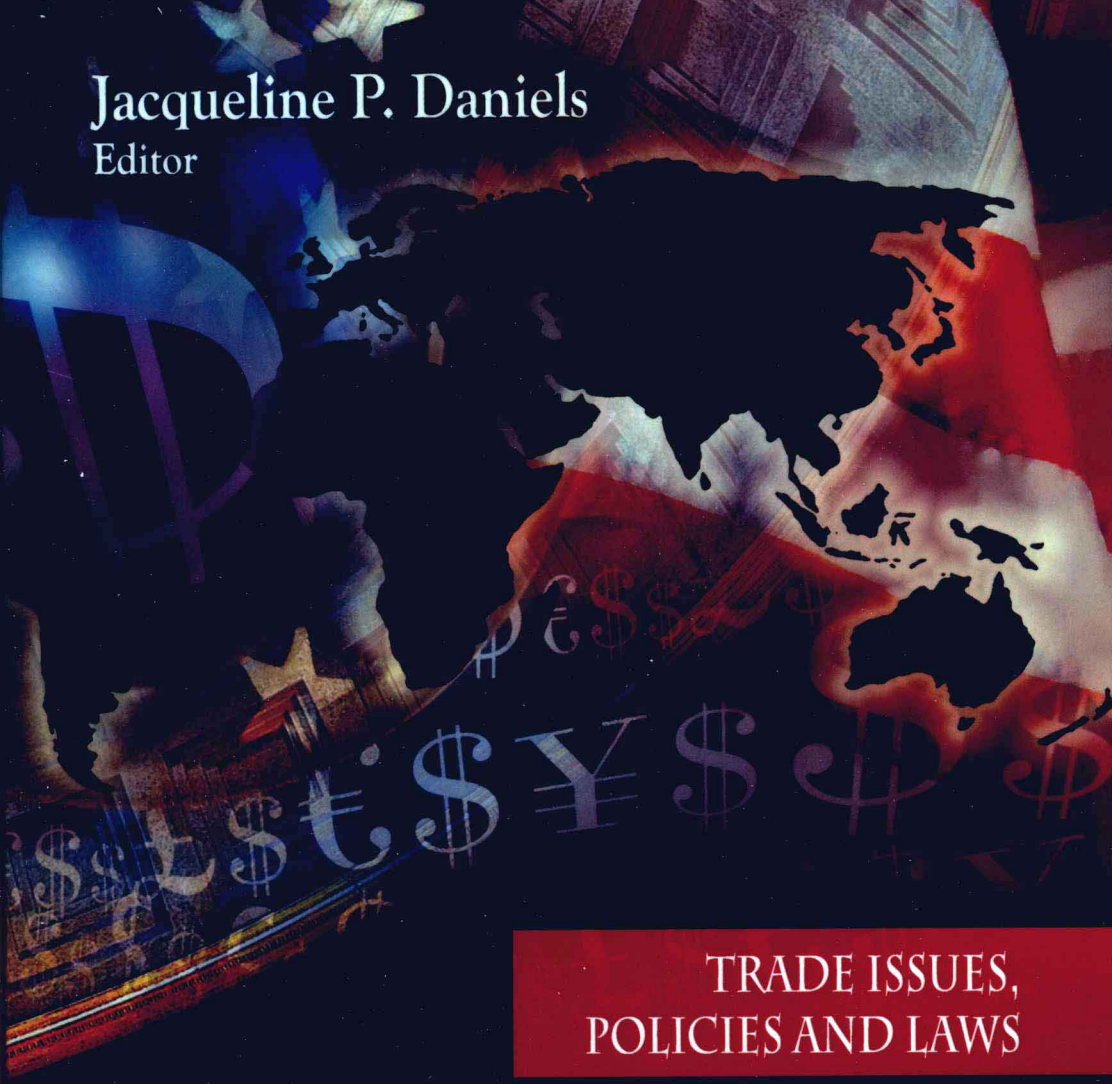

TRADE ISSUES, POLICIES AND LAWS

DISPUTED WTO CASES INVOLVING THE UNITED STATES

NOVA

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Chapter 1

WTO DISPUTE SETTLEMENT: STATUS OF U.S. COMPLIANCE IN PENDING CASES*

Jeanne J. Grimmet

SUMMARY

Although the United States has complied with adverse rulings in many past World Trade Organization (WTO) disputes, there are currently 10 cases in which rulings have not yet been implemented or the United States has taken action and the dispute has not been fully resolved. Under WTO dispute settlement rules, a WTO Member will generally be given a reasonable period of time to comply with an adverse WTO decision. While the Member is expected to remove the offending measure by the end of this period, compensation and temporary retaliation are available if the Member has not acted or taken sufficient action by this time. Either disputing party may request a compliance panel if there is disagreement over whether a Member has complied.

The United States has not yet settled long-standing disputes with the European Union (EU) regarding a music copyright statute and a statutory trademark provision affecting property confiscated by Cuba. H.R. 1530, H.R. 1531, H.R. 2272, and S. 1189 would repeal the trademark statute, while H.R.

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1103 and S. 1234 would amend the provision. Also unresolved is a dispute with Japan, initiated in 1999, over a provision of U.S. antidumping law. The Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), which was held WTO-inconsistent in January 2003 and repealed, effective October 2005, by P.L. 109-171, remains the target of sanctions by complainants EU and Japan due to continued payments to U.S firms under the CDSOA program. In addition, the United States and Antigua have been consulting on the resolution of outstanding issues in Antigua's challenge of U.S. online gambling restrictions.

P.L. 109-171 also repealed a WTO-inconsistent cotton program at issue in Brazil's 2002 complaint over U.S. cotton subsidies, but other programs were also successfully challenged and the United States was later found not to have fully complied. The United States has since made statutory and administrative changes affecting the export credit guarantee programs faulted in the case. At the same time, Brazil has continued to pursue sanctions and on November 19, 2009, the WTO authorized Brazil to suspend tariff concessions on U.S. goods in an amount of $294.7 million a year, a figure that may vary annually based on actual U.S. export subsidization. In addition, if a variable threshold based on U.S. trade in goods with Brazil is exceeded, Brazil may suspend WTO obligations involving U.S. intellectual property and services. Brazil has published a list of U.S. goods potentially subject to increased tariffs, but will not announce until February 2010 the final list of products and the total value of sanctions that would be imposed. On December 21, 2009, Brazil announced that, based on 2008 data provided by the United States, it is entitled to annual retaliation of $829.3 million.

Four pending cases involve the U.S. practice of "zeroing," under which the Department of Commerce (DOC), in calculating dumping margins, disregards non-dumped sales. The practice was successfully challenged by the EU in two cases (EU I and II), Japan, and Mexico. In response to EU I, DOC discontinued the use of zeroing in the price comparison employed most often in original antidumping investigations and recalculated dumping margins in the cases cited by the EU. The United States has yet to fully comply in EU I and in the challenges by Japan and Mexico to the extent that the WTO decisions affect the use of zeroing in other phases of U.S. antidumping proceedings. Compliance proceedings in EU I and Japan's challenge, completed in 2009, found against the United States, permitting complainants to pursue sanctions requests. Also, Mexico initiated compliance proceedings in August 2009, and a compliance deadline of December 19, 2009, was established in EU II. The United States stated that it will recalculate dumping

margins in four original antidumping investigations cited in EU II and that it is discussing outstanding issues with interested parties. With other facets of EU II remaining unaddressed, however, the EU has indicated that it may request a compliance panel in the proceeding.

This chapter provides a summary of the status of U.S. compliance efforts in pending World Trade Organization (WTO) disputes that have resulted in adverse rulings against the United States. Although the United States has complied with adverse rulings in many past WTO disputes,[1] there are 10 pending cases in which the United States has not fully implemented adopted WTO panel and Appellate Body reports or the United States has taken action, including the enactment of legislation, but the prevailing parties in the dispute continue to question whether the United States has fully complied and, in one case, continue to impose WTO-authorized trade sanctions. In all of these disputes, original or subsequently extended compliance deadlines have expired. Compliance in these cases may implicate either legislative or administrative action by the United States.

The report begins with an overview of WTO dispute settlement procedures, focusing on the compliance phase of the process, followed by a discussion of U.S. laws relating to WTO dispute proceedings. The report then lists pending WTO disputes in the compliance phase, with a discussion of major issues and the U.S. compliance history in each. Each entry contains a section titled "Recent Developments," which discusses the latest activity in the case.

WTO Dispute Settlement Procedures

WTO disputes are conducted under the terms of the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).[2] The DSU, which entered into force with the establishment of the World Trade Organization on January 1, 1995, carries forward and expands upon dispute settlement practices developed under the General Agreement on Tariffs and Trade (GATT). The DSU is administered by the WTO Dispute Settlement Body (DSB), which is composed of all WTO Members. Where individual WTO agreements contain special or additional dispute settlement rules that differ from those in the DSU (e.g., expedited timelines for subsidy disputes in the Agreement on Subsidies and Countervailing Measures), the former will prevail. A list of these agreements

and rules is contained in Appendix 2 of the DSU. The Office of the United States Trade Representative (USTR) represents the United States in the WTO and in WTO disputes.

WTO dispute settlement may be characterized as a three-stage process: (1) consultations; (2) panel and, if requested, Appellate Body (AB) proceedings; and (3) implementation. Within this framework, the DSB establishes panels; adopts panel and appellate reports; authorizes countermeasures when requested; and monitors the implementation of dispute settlement results. The establishment of panels, adoption of panel and AB reports, and authorization of countermeasures are decisions that are subject to a "reverse consensus" rule under which the DSB agrees to these actions unless all DSB Members object. In effect, these decisions are virtually automatic. Article 23 of the DSU requires a complaining Member to act in accordance with the DSU when it initiates a dispute, including making any internal determination that another Member has violated a WTO obligation consistent with the WTO decision in the case and following DSU procedures to set a deadline by which the defending Member must comply, determining the level of sanctions for non-compliance, and obtaining authorization from the DSB to impose any such sanctions.

After the DSB adopts an adverse panel and any Appellate Body report, the defending Member must inform the DSB of its compliance plans. If it is impracticable for the Member to comply immediately, the Member will be allowed a "reasonable period of time" to do so. If the Member proposes a compliance period and it is not approved by the DSB, the disputing parties may negotiate a deadline themselves. If this fails, the length of the period will be arbitrated. A WTO Member found to have violated WTO obligations is expected to comply by withdrawing the offending measure by the end of the established compliance period, with compensation and temporary retaliation available to the prevailing party as alternative remedies. Full compliance is the preferred outcome, however, so as to ensure that negotiated rights and obligations are preserved and maintained.

Article 22 of the DSU provides that if the prevailing Member in a dispute believes that the defending Member has not implemented the WTO rulings and recommendations by the end of the established compliance period, it may request the other Member to negotiate a compensation agreement or it may ask the DSB for authorization to suspend WTO concessions, usually to impose higher tariffs on selected imports from the defending country. The Member may choose the latter option without first requesting compensation. In some

cases, the prevailing party may agree to extend the original compliance deadline instead of immediately seeking a remedy.

If a prevailing Member does choose to suspend concessions, it is expected to do so in the same sector in which the WTO violation was found, but if the Member finds that this is not "practicable or effective," it may seek to suspend concessions in other sectors in the same agreement. If, however, the Member finds that this alternative would also be impracticable or ineffective and that "the circumstances are serious enough," it may seek to suspend obligations under another WTO agreement, referred to as "cross-retaliation." A prevailing Member may seek to cross- retaliate if, for example, in a dispute involving trade in goods, the Member does not import a sufficient amount of goods from the defending Member to remedy the trade injury involved or the Member believes that placing tariff surcharges on goods imported from the defending Member would be unreasonably costly for the prevailing Member's economy.

Under the DSU, the DSB is to authorize the retaliation request under the reverse consensus rule within 30 days after the compliance period expires. If the defending Member objects to the request, however, the proposed retaliation will be arbitrated and the 30-day deadline for approving the retaliation request effectively extended. The objection may relate to the level of nullification or impairment of benefits involved or whether DSU cross-retaliation rules have been followed. The arbitration, which may be carried out by the original panel if members are available, or by an arbitrator appointed by the WTO Director General, is ordinarily to be completed within 60 days after the compliance period expires. The DSB then meets to authorize the retaliation request, subject to any modification by the arbitrator.

In addition, Article 21.5 of the DSU provides for further dispute settlement proceedings in the event the disputing parties disagree as to whether the defending Member has implemented the WTO rulings and recommendations in a particular case. Once a compliance panel is convened, it is expected to issue its report within 90 days; the report may then be appealed. In practice, compliance panels may require a considerably longer period of time to complete their work where a complicated case is involved. For example, in the European Union's challenge to the U.S. use of "zeroing" in antidumping proceedings (DS294), the EU made its compliance panel request in September 2007, panelists were appointed in November 2007, and the panel report was not publicly circulated until December 2008.

Because the DSU fails to incorporate Article 21.5 proceedings into the 30-day period for approving countermeasures and the timeframe for any subsequent arbitration, a procedural problem, referred to as "sequencing," has

resulted. Disputing Members have often filled the gap by entering into ad hoc bilateral procedural agreements setting out timelines for any requested compliance-related proceedings and reserving Members' rights in the unfolding of these proceedings.[3] Such agreements have been entered into in many of the cases discussed below.

The DSU provides that any suspension of concessions or other obligations is temporary and may only be applied by the prevailing Member until the WTO-inconsistent measure is removed, the defending Member provides a solution to any trade injury at issue, or a mutually satisfactory resolution of the dispute is reached.[4] Moreover, if a prevailing Member is ultimately authorized to impose countermeasures, the Member is not required to implement them. As evident from some of the cases discussed in this chapter, WTO Members may manage disputes in a variety of ways at the compliance phase, short of imposing sanctions.

URUGUAY ROUND AGREEMENTS ACT (URAA): STATUTORY REQUIREMENTS FOR IMPLEMENTING WTO DECISIONS

The legal effect of Uruguay Round agreements and WTO dispute settlement results in the United States is comprehensively dealt with in the Uruguay Round Agreements Act (URAA), P.L. 103- 465, which addresses the relationship of WTO agreements to federal and state law and prohibits private remedies based on alleged violations of WTO agreements.[5] The statute also requires the United States Trade Representative (USTR) to keep Congress informed of disputes challenging U.S. laws once a dispute panel is established, any U.S. appeal is filed, and a panel or Appellate Body report is circulated to WTO Members.[6] In addition, the URAA places requirements on regulatory action taken to implement WTO decisions and contains provisions specific to the implementation of panel and appellate reports that fault U.S. actions in trade remedy proceedings.

Section 102: Domestic Legal Effect of WTO Decisions

Section 102 of the URAA and its legislative history establish that domestic law supersedes any inconsistent provisions of the Uruguay Round

agreements and that congressional or administrative action, as the case may be, is required to implement adverse decisions in WTO dispute settlement proceedings.

Federal Law

Section 102(a)(1), 19 U.S.C. § 3512(a)(1), provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." The URAA further provides, at § 102(a)(2), 19 U.S.C. § 35 12(a)(2), that nothing in the statute "shall be construed ... to amend or modify any law of the United States ... or ... to limit any authority conferred under any law of the United States ... unless specifically provided for in this act."

As explained in Statement of Administrative Action (SAA) accompanying the Uruguay Round agreements when they were submitted to Congress in 1994, "[i]f there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence."[7] Moreover, section 102 is further intended to clarify that all changes to U.S. law "known to be necessary or appropriate" to implement the WTO agreements are incorporated in the URAA and that any unforeseen conflicts between U.S. law and the WTO agreements "can be enacted in subsequent legislation"[8] Congress has traditionally treated potential conflicts with prior GATT agreements and free trade agreements in this way, treatment that it also deems to be "consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements."[9]

This approach carries over into the implementation of WTO dispute settlement results, a situation explained as follows in URAA legislative history:

> Since the Uruguay Round agreements as approved by the Congress, or any subsequent amendments to those agreements, are non-self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.[10]

State Law

Where a state law is at issue in a WTO dispute, the URAA provides for federal-state cooperation in the proceeding and limits any domestic legal challenges to the law to the United States.[11] The act's general preclusion of private remedies (discussed below) further centralizes the response to adverse WTO decisions involving state law in the federal government.[12]

Section 102(b) provides as follows:

> No State law, or the application of a such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or its application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purposes of declaring such law or application invalid.[13]

According to legislative history, the provision "makes clear that the Uruguay Round agreements do not automatically preempt State laws that do not conform to their provisions, even if a WTO dispute settlement panel or the Appellate Body were to determine that a particular State measure was inconsistent with one or more of the Uruguay Round agreements."[14] The statute also contains certain restrictions in any such legal action brought by the United States, including that the report of the WTO dispute settlement panel or the Appellate Body may not be considered binding or otherwise accorded deference.[15] Any such suit by the United States is expected to be a rarity.[16]

Preclusion of Private Remedies

Private remedies are prohibited under § 102(c)(1) of the URAA, 19 U.S.C. § 351 2(c)(1), which provides that "[n]o person other than the United States ... shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreements" or "may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement."

Congress has additionally stated in § 102(c)(2) of the URAA, 19 U.S.C. § 3512(c)(2), that it intends, through the prohibition on private remedies:

> to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action

against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements—

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

The House Ways and Means Committee report on the URAA discusses the rationale and implications of § 102(c) as follows:

> For example, a private party cannot bring an action to require, preclude, or modify government exercise of discretionary or general "public interest" authorities under other provisions of law. These prohibitions are based on the premise that it is the responsibility of the Federal Government, and not private citizens, to ensure that Federal or State laws are consistent with U.S. obligations under international agreements such as the Uruguay Round agreements.[17]

The SAA notes, however, that § 102(c) "does not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Uruguay Round agreements, although any change in agency action would have to be authorized by domestic law."[18]

Domestic Implementation of WTO Decisions Involving Administrative Action

In addition to the URAA provisions that limit the direct effect of WTO rules and decisions in U.S. law, the URAA also places requirements on agencies in their implementation of WTO panel and Appellate Body reports. These provisions apply to regulatory action in general and to new agency determinations in response to WTO decisions involving trade remedy proceedings.

Section 123: Regulatory Action Generally

Section 123(g) of the URAA, 19 U.S.C. § 3533(g), provides that in any WTO case in which a departmental or agency regulation or practice has been found to be inconsistent with a WTO agreement, the regulation or practice may not be rescinded or modified in implementation of the decision "unless and until" the United States Trade Representative and relevant agencies meet

congressional consultation and private sector advice requirements, the proposal has been published in the *Federal Register* with a request for public comment, and the final rule or other modification has been published in the *Federal Register*.[19] Section 123(g) does not apply to any regulation or practice of the U.S. International Trade Commission.

The statute requires the USTR to consult with "the appropriate congressional committees" regarding the proposed contents of the final rule or other modification. These committees include the House Ways and Means Committee, the Senate Finance Committee, and any other congressional committees that have jurisdiction over matter at hand.[20] In addition, the final rule or other modification may not take effect until 60 days after the USTR has begun committee consultations, unless the President determines that an earlier effective date is in the national interest. The House Ways and Means Committee and the Senate Finance Committee may vote to indicate the disagreement of the committee with the proposed action during the 60-day period. Any such vote is not binding on the agency or department involved.[21]

Section 129: Agency Determinations in Trade Remedy Proceedings

Section 129 of the URAA, 19 U.S.C. § 3538, sets forth authorities and procedures under which the Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) may issue new subsidy, dumping and injury determinations, referred to as Section 129 Determinations, in implementation of adverse WTO decisions involving U.S. safeguards, antidumping, and countervailing duty proceedings. Section 129 does not authorize the Commerce Department or the ITC to issue new determinations on their own motion, but instead grants the USTR the discretion to direct the agency to do so in a given case.

In antidumping and countervailing duty investigations, which are carried out under authorities in Title VII of the Tariff Act of 1930, 19 U.S.C. §§ 1671-1677n, the Commerce Department determines the existence and level of dumping or subsidization, as the case may be, and the ITC determines whether the dumped or subsidized imports cause material injury, or a threat of material injury, to a domestic industry. Under U.S. safeguards law, set forth in Title II of the Trade Act of 1974, 19 U.S.C. §§ 2251-2254, the ITC conducts investigations to determine if increased imports, whether or not they are fairly traded, are a substantial cause of serious injury to a domestic industry. If the ITC makes an affirmative injury determination, it recommends remedial measures (e.g., a tariff surcharge or import quota) to the President, who ultimately determines whether or not to take action.

Implemented Section 129 Determinations in antidumping and countervailing duty cases are reviewable in the U.S. Court of International Trade and by binational panels established under Chapter 19 of the North American Free Trade Agreement (NAFTA).[22] Chapter 19 panels are available to review final agency determinations in antidumping and countervailing duty investigations involving NAFTA countries in lieu of judicial review in the country in which the determination is made.

U.S. International Trade Commission

If an interim WTO panel report or a WTO Appellate Body report concludes that an action by the ITC in connection with a trade remedy proceeding is inconsistent with U.S. obligations under the WTO Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, or the Agreement on Safeguards, the USTR may request the ITC to issue an advisory report on whether U.S. antidumping, countervailing duty, or safeguards law, as appropriate, allows the ITC to take steps with respect to the proceeding at issue that would render its action "not inconsistent with" the panel or AB findings.[23]

The ITC is to report to the USTR within 30 calendar days of the USTR's request where an interim report is involved, and within 21 calendar days in case of an AB report.[24] These deadlines are aimed at ensuring that the USTR will receive the requested advice in time to decide whether to appeal a panel's interim report or to implement an adverse report, and to estimate the period of time that may be needed to implementing the WTO decision.[25]

If a majority of the ITC Commissioners have found that action may be taken under existing law, the USTR must consult with the House Ways and Means Committee and the Senate Finance Committee and may request the ITC in writing to issue a new determination in the underlying proceeding that would render the ITC action "not inconsistent with" the WTO findings.[26] The new determination must be issued within 120 days of the USTR's request.[27] The 120-day limit is intended to allow the USTR to propose a reasonable period of time for implementation to the WTO Dispute Settlement Body once the DSB adopts a WTO panel and any Appellate Body report in a case.[28]

In the event the ITC issues a new negative injury or threat of injury determination, the imports subject to antidumping or countervailing duty order at issue, or a least a portion of them, would no longer be considered to have caused a harmful effect, even though they may in fact be dumped or subsidized. The Tariff Act requires that the imposition of antidumping or countervailing duties on dumped or subsidized imports be supported by an

affirmative injury determination and thus, absent such a determination, the antidumping or countervailing duty order would need to be revoked in whole or in part. Section 129(a)(6) authorizes the USTR to direct the Commerce Department to take this action.[29] The USTR must consult with the House Ways and Means and Senate Finance Committees before the ITC's new determination is implemented.[30]

Where a safeguard proceeding is involved, section 129 authorizes the President, after receiving a new ITC determination, to reduce, modify, or terminate the safeguard notwithstanding other statutory requirements governing changes in existing safeguard measures.[31] The President must consult with the House Ways and Means Committee and Senate Finance Committee before acting under this authority. The USTR is required to publish a notice of the implementation of any ITC determination in the *Federal Register*.[32]

Department of Commerce

Section 129 also sets out a procedure for new Department of Commerce determinations in antidumping and countervailing duty proceedings, though without the requirement for an initial agency advisory report regarding the scope of the agency's statutory discretion. Instead, promptly after the issuance of a WTO panel or Appellate Body report finding that a DOC determination in an antidumping or countervailing duty proceeds is inconsistent with U.S. obligations under the WTO Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the USTR is to consult with the Commerce Department and the House Ways and Means and Senate Finance Committees, and may request the Department, in writing, to issue a determination in connection with the underlying antidumping or countervailing duty proceeding that would render its action "not inconsistent with" the panel or appellate findings.[33] The Commerce Department must issue its Section 129 Determination within 180 days of the request.[34] A new determination may, for example, reduce the dumping margin or net subsidy and thus result in a reduction of existing duties. After consulting with DOC and the above-named congressional committees, USTR may direct DOC to implement its determination in whole or in part.[35]

Prospective Implementation of Section 129 Determinations

Section 129(c)(1) of the URAA provides that Section 129 Determinations, whether issued by the ITC or the Commerce Department, apply prospectively, that is, the full or partial revocation of the antidumping or countervailing duty

order or the implementation of the DOC determination, as the case may be, applies to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse for consumption, *on or after* the date on which the USTR directs the Commerce Department to revoke the order or implement the determination.[36] Unliquidated entries are those for which the U.S. Customs and Border Protection has not ascertained a final rate and amount of duty.[37] Notices of the implementation of Section 129 Determinations must be published in the *Federal Register*.

The Uruguay Round SAA explains the operation of § 129(c)(1) as follows:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.[38]

Canada unsuccessfully challenged § 129(c)(1) in a WTO dispute settlement proceeding in 2001 on the ground that the provision violated the WTO Dispute Settlement Understanding and various WTO antidumping and countervailing duty obligations. Under the retrospective U.S. antidumping and countervailing duty system, DOC ordinarily makes a final assessment of the duties owed on dumped or subsidized goods in an administrative review conducted after the goods are imported. The review covers goods that enter the United States during a specified prior 12-month period. Until this final duty assessment is made for particular goods, importers must deposit estimated duties with U.S. Customs and Border Protection (CBP) on entry.[39] Canada argued that, where a DOC or ITC determination in an antidumping or countervailing duty proceeding is found to violate a WTO obligation, § 129(c)(1) effectively prohibits the United States from fully complying with the WTO decision by preventing it from refunding estimated duties deposited with CBP before the date that the Section 129 Determination is implemented. In